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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 6178 Misc.

STEVEN G. LEGUM,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Steven G. Legum, prays that a writ of certiorari issue to review a purported judgment of the Court of Appeals of the State of New York, dated November 8, 1973, which actually denied petitioner leave to appeal thereto from an order of the Supreme Court, Appellate Term, Ninth and Tenth Judicial Districts, rendered July 16, 1973, which affirmed a judgment of conviction rendered in the District Court of Nassau County on October 4, 1972, after a non-jury trial for violation of Section 1180-D of the Vehicle and Traffic Law. Petitioner was fined $20.00 by the trial court.

The judgment of conviction was affirmed without opinion by the Appellate Term of the Supreme Court of the State of New York for the Ninth and Tenth Judicial Districts on July 16, 1973. A copy of the order affirming petitioner's conviction is attached as Exhibit A.

An application, pursuant to Section 460.20 of the Criminal Procedure Law, for leave to appeal to the New York Court of Appeals was denied by Hon. Domenick L. Gabrielli, Associate Judge of the Court of Appeals, on September 6, 1973. A copy of the certificate denying leave is attached as Exhibit B.

Following reargument of petitioner's previous application to the Court of Appeals, leave to appeal was again denied by Judge Gabrielli on November 8, 1973. A copy of the certificate denying leave after reargument is attached as Exhibit C.

Jurisdiction

The jurisdiction of this Court is sought pursuant to 28 U.S.C.A. 1257, subd. 3, it being contended that petitioner's Sixth Amendment right to confront and cross-examine witnesses against him was not properly complied with.

Facts

EDWARD WEISINGER of the Nassau County Police Department testified that on the 24th day of May, 1972, at approximately 10:20 A.M., he was on radar traffic enforcement control in the vicinity of Park Street, Village of Atlantic Beach. This officer testified as to the model and type of radar equipment he used that morning, his training and the manner in which the equipment was set up on the roadway (Minutes of Trial at pp. 2-3). The witness described the various tests which were taken to determine the accuracy of the radar equipment at the time and place of the violation (3).

Officer Weisinger testified that he had experience and training in making independent estimates and comparing them against calibrated measuring devices. He stated that the variation between his independent estimates and the

measuring devices was approximately 3 or 4 miles per hour (4).

This police officer observed the defendant operating a 1972 Ford Pinto, license no. MH 3717, proceeding eastbound on Park Street. When first observed, the defendant was approximately 600 feet away, at which time an independent estimate was made of the defendant's speed. As the defendant's vehicle entered the range of influence of the radar equipment, the officer estimated that the defendant's vehicle was proceeding at approximately 45 miles per hour. A reading of the defendant's speed on the radar graph confirmed that at the time he was traveling 47 miles per hour (4-5). This police officer recorded the make and model of the defendant's vehicle on the radar graph after observing his speed, and this was marked "Deemed in evidence." (6)

Testimony established that there were no other vehicles which entered the sphere of influence at the same time in which the defendant's speed was recorded by the police officer (7).

Officer Weisinger testified as to the type, nature and location of the respective speed control signs. It was stated that the speed limit at this location was 30 miles per hour, as indicated on the signs, and that the defendant's vehicle was observed passing one of the signs which was readily visible for eastbound traffic on Park Street (7-8).

On cross-examination it was established that Officer Weisinger refreshed his recollection from notes which were made at the time of the violation and that his previous training involved the use of radar equipment which he fully described (9-11, 17).

EDWARD WATSON of the Nassau County Police Department testified on May 24, 1972, he was on a tour of duty with Officer Weisinger in the vicinity of Park Street and

Atlantic Avenue, which duty involved radar enforcement control (19-20). This officer described his observation of a 1972 Ford Pinto which proceeded eastbound on Park Street and was estimated by him at approximately 46 miles per hour. Officer Watson testified that he has operated motor vehicles for the Nassau County Police Department for more than 21 years and that he has made approximately 75 or 80 estimates of the speed of moving vehicles each day and has compared them with speedometers or other measuring devices. He testified that the variation between his independent estimates and the speedometer readings varied between 2 to 3 miles per hour (20-22). After estimating the defendant's speed at 46 miles per hour, Officer Watson compared this with the speedometer on the radar equipment and found the defendant's speed to be 47 miles per hour (21-22).

Officer Watson, after observing the violation, proceeded to stop the defendant, examined his license and registration and issued a summons. This officer checked the identification of the defendant on the license and registration which were given to him at the time of the violation and made notes concerning the defendant's description (23-24). The officer's notes made at the time of the violation were used to refresh his recollection at the time of giving his testimony at the trial (34).

POINT I

The writ should be denied.

In testifying as to the details of petitioner's traffic violation, both police officers relied upon notes they had made at the time of the incident in order to refresh their recollection of what had occurred. Petitioner's trial was held more than four months after the traffic violation.

It is petitioner's position that because the two police officers testified in part from written notes rather than directly from memory, he was unconstitutionally deprived of his ability to effectively cross-examine these two witnesses.

The People respectfully submit that petitioner's contention is patently without merit.

It is now well-established in New York that where a witness has no present recollection of the subject matter upon which he is called to testify, it is permissible to stimulate or revive his memory through the use of any writing. Richardson, Law of Evidence (10th Ed. 1973) §§ 465-466 at pp. 453-457.

There was no denial of petitioner's right to effectively cross-examine both police officers since the notes made by each officer at the time of the violation were readily available for scrutiny by the petitioner during the trial and could have been used by him for purposes of cross-examination. *People* v. *Gezzo*, 307 N.Y. 385, 394, 121 N.E. 2d 380 (1954). After each officer referred to his notes, his recollection was refreshed, his testimony was offered directly, and in the absence of any request on the part of the petitioner, there was no requirement that these notes be marked into evidence.

The People, therefore, respectfully submit that petitioner was afforded adequate opportunity to cross-examine both police officers. Allowing the two witnesses to refresh their recollections by reference to their notes was proper and did not undermine petitioner's ability to question them since those notes were available for petitioner to scrutinize and to use during his cross-examination of the officers.

CONCLUSION

The writ should be denied.

Respectfully submitted,

WILLIAM CAHN
District Attorney
Nassau County
Attorney for Respondent

HENRY P. DEVINE
ROBERT N. ZAUSMER
Assistant District Attorneys
Of Counsel.

Exhibit A—Unreported Opinion of Appellate Term of the Supreme Court for the 9th and 10th Judicial Districts

Cal. No. 120 (N)

May/'73.

At a term of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, held in Nassau County, on the 16th day of July, 1973.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

—against—

STEVEN A. LEGUM,
Appellant.

Present:

HON. HOWARD T. HOGAN
Presiding Justice,

MARIO PITTONI
FRANK S. MCCULLOUGH
Justices.

The above named Steven A. Legum, the defendant herein, appealed to this Court from a judgment of the District Court, Nassau County, rendered on the 4th day of October, 1972, after a trial convicting him of violation of Village Ordinance #1, Inc. Village of Atlantic Beach, and imposing sentence as follows:

Fined $20.

and the said appeal having been argued by Mr. Steven A. Legum, in person for the appellant, and submitted by Mr. Herbert H. Esrick, of counsel for the respondent, and due deliberation having been had thereon;

It is hereby ordered and adjudged that the judgment of conviction so appealed from be, and the same is hereby, affirmed.

Exhibit B—Certificate Denying Leave

STATE OF NEW YORK—COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK

—against—

STEVEN G. LEGUM

Before:

HON. DOMENICK L. GABRIELLI
Associate Judge.

I, DOMENICK L. GABRIELLI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Bath, New York
Sept. 6, 1973

/s/ DOMENICK L. GARRIELLI
Associate Judge

*Description of Order: Appellate Term order dated 7/16/73.

Exhibit C—Certificate Denying Leave (after reargument)

STATE OF NEW YORK—COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK

—against—

STEVEN G. LEGUM

Before:

HON. DOMENICK L. GABRIELLI
Associate Judge.

I, DOMENICK L. GABRIELLI, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant, for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* and following reargument of a previous application, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Bath, New York
Nov. 8, 1973

/s/ DOMENICK L. GARRIELLI
Associate Judge

*Description of Order: